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9 **TERRA VAC CORPORATION and**  
10 **TERRA-VAC, INC. dba TERRA-VAC, P.R.**

11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 JACOB CALANNO,  
14 Plaintiff,

15 v.

16 TERRA VAC CORPORATION, a California  
17 corporation; TERRA-VAC, INC., a  
18 corporation, dba TERRA-VAC, P.R.; and  
19 DOES 1 through 100, inclusive  
20 Defendants.

CASE NO. 07cv2052-BTM (POR)

Hearing Date: 05/02/2008  
Time : 11:00 a.m.  
Courtroom : 15

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS FOR FAILURE  
TO STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED (FRCP  
12(b)(6))

NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT

21 Defendants TERRA VAC CORPORATION and TERRA-VAC, INC. doing business as  
22 TERRA-VAC, P.R. (collectively "TERRA-VAC") submit the following memorandum of points and  
23 authorities in support of their motion to dismiss plaintiffs' complaint pursuant to Federal Rules of  
24 Civil Procedure Rule 12(b)(6).

25 I.

26 INTRODUCTION

27 Plaintiff was originally hired by OHM, a corporation located in Findlay, Ohio, to work at the  
28 El Centro Naval Air Facility ("El Centro") under a contract between OHM and the United States

1 Navy. (*See Plaintiff's Complaint, page 2, lines 22-24*).

2 Plaintiff was employed to help operate the incinerator and perform other environmental tasks  
3 at El Centro. The United States Navy contracted the environmental cleanup work at El Centro out to  
4 various companies with whom Plaintiff was continuously employed.

5 TERRA-VAC specializes in environmental remediation by the use of vacuum extraction  
6 technology for the removal of volatile contaminants from the subsurface. TERRA-VAC contracted  
7 with the United States Navy to perform the environmental remediation at El Centro.

8 Plaintiff alleges that TERRA-VAC directed Plaintiff to raise the "slurp tubes" that drew the  
9 contaminated water up three (3) feet, in order to reduce effluent trapped in the filter and reduce filter  
10 costs. (*See Plaintiff's Complaint, page 3, lines 13-20*). Plaintiff further alleges that TERRA-VAC  
11 changed the reported contaminants from methane to hexane in order to cause the numbers to  
12 artificially increase. (*See Plaintiff's Complaint, page 3, lines 13-20*). Plaintiff alleges that he was  
13 terminated by TERRA-VAC on October 26, 2005, in retaliation for reporting TERRA-VAC's  
14 activities to the United States Navy. (*See Plaintiff's Complaint, page 4, lines 16-24*).

15 Plaintiff has alleged causes of action for violation of the False Claims Act, misrepresentation  
16 to a potential employer, and libel and slander per se. As explained below, Plaintiff has not alleged  
17 facts sufficient to support these causes of action against TERRA-VAC.

18 Furthermore, Plaintiff's complaint alleges the above causes of action in an attempt to plead  
19 around two roadblocks to a wrongful termination action: (1) the two year statute of limitations and  
20 (2) failure to exhaust administrative remedies. Plaintiff's wrongful termination action would  
21 necessarily fail because of these two defects. For this reason, Plaintiff has brought these three causes  
22 of action to avoid the pitfalls of a wrongful termination action.

23 TERRA-VAC respectfully requests that Plaintiff's complaint be dismissed pursuant to Federal  
24 Rules of Civil Procedure 12(b)(6).

## 25 II.

### 26 **PLAINTIFF'S FALSE CLAIMS ACT CLAIM FAILS BECAUSE THE PROCEDURAL** 27 **PREREQUISITES TO A 31 U.S.C. 3730(h) CLAIM ARE NOT ALLEGED**

28 31 USC §3729 provides liability arising from false claims knowingly made to the United

1 States Government. Civil actions for false claims are governed by 31 USC §3730. The False Claims  
2 Act provides private persons with a cause of action, however, it requires that, "The action shall be  
3 brought in the name of the government." 31 USC §3730(b). United States Code section 31 USC  
4 §3730 provides further procedures for bringing a civil action pursuant to the False Claims Act,  
5 including in camera filing and service of the complaint and material evidence on the Government and  
6 a 60 day waiting period that allows the government to elect to intervene.

7 Plaintiff has failed to allege compliance with the above procedures. Plaintiff has brought his  
8 claim under the False Claims Act in his name individually and not in the name of the Government.  
9 Plaintiff failed to serve the action on the government and comply with the 60 period allowing the  
10 government to decide whether to intervene.

11 The government has not elected to intervene and proceed with the action pursuant to 31 USC  
12 3730. If Plaintiff had followed the proper procedures and the government decided to pursue the  
13 action, then the government would proceed with the action and Plaintiff would be a qui tam plaintiff.  
14 Plaintiff has instead opted to bring the action in his own name in violation of the procedures laid out  
15 in 31 U.S.C. 3730.

16 Plaintiff has alleged that he was discharged in retaliation for his reporting false claims, but  
17 does not allege any lawful acts that were taken by him to further a claim brought under 31 USC  
18 3730(h). 31 USC 3730(h) requires that these acts be "done by the employee...in furtherance of an  
19 action under this section, including investigation for, initiation of, testimony for, or assistance in an  
20 action filed or to be filed." Plaintiff simply alleges that he reported false claims and was discharged  
21 from his employment. These are conclusory allegations that fail to provide a factual basis for this  
22 cause of action. Plaintiff makes no reference whatsoever to any qui tam action that has been filed or  
23 any qui tam action that will be filed. Plaintiff's actions are not in furtherance of a claim pursuant to  
24 the False Claims Act, and necessarily fail to state a cause of action.

25 Plaintiff has clearly failed to state facts sufficient to support a claim under the False Claims  
26 Act and his first cause of action should be dismissed.

27 ///

28 ///



III.

**PLAINTIFF HAS FAILED TO PLEAD FACTS SUFFICIENT TO STATE A  
CAUSE OF ACTION FOR MISREPRESENTATION TO A POTENTIAL EMPLOYER**

California Civil Code Sections 1050 and 1054 do not apply to the present cause of action. The applicable code sections are actually California Labor Code section 1050 and 1054.

California Labor Code Section 1050 provides that:

Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person...by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

This code section, [incorrectly] cited by Plaintiff in support of his cause of action for misrepresentation, provides for criminal penalties that are inapplicable to the current civil case.

California Labor Code Section 1054 provides civil liability for the same conduct covered by section 1050. Plaintiff has alleged that TERRA-VAC has made misrepresentations to his potential employers regarding his job performance.

California Civil Code Section 47(c) provides a conditional privilege for statements made without malice by a current or former employer to a prospective employer. Civil Code §47(c) provides in part that the privilege,

“applies to and includes communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant.”

Therefore, statements made by former or present employers to prospective employers without malice are privileged under California Civil Code section 47(c).

This privilege protects any statements made by TERRA-VAC to any of Plaintiff's prospective employers without malice. For purposes of determining whether the privilege applies, malice “is not inferred from the communication itself.” (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363,1370). The malice required to overcome this qualified privilege is actual malice or malice in fact, or “a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or

1 injure another person.” (*Id.*, citing *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1204; *Brown v. Kelly*  
 2 *Broadcasting Co.* (1989) 48 Cal.3d 711, 723).

3 Plaintiff has failed to state facts sufficient to constitute malice on the part of TERRA-VAC  
 4 to overcome the conditional privilege afforded by Civil Code section 47(c). Plaintiff simply alleges  
 5 that TERRA-VAC has made misrepresentations and that the misrepresentations include statements  
 6 that Plaintiff submitted false numbers to the Defendant and Navy. (*See Plaintiff's Complaint, page*  
 7 *5, lines 23-26*). He does not allege facts regarding TERRA-VAC's state of mind when the alleged  
 8 statements were made, nor does he allege TERRA-VAC had any ill-will in making these alleged  
 9 statements. Plaintiff simply alleges that these misrepresentations were made and has alleged no malice  
 10 on the part of TERRA-VAC that would overcome the conditional privilege.

11 Plaintiff also fails to allege any of these statements were made within the one year statute of  
 12 limitations that applies to actions for libel and slander pursuant to California Code of Civil Procedure  
 13 section 340(c). Plaintiff was discharged from his position at TERRA-VAC on October 26, 2005, more  
 14 than two years before he filed a complaint. The misrepresentations that Plaintiff alleges were made  
 15 to prospective employers could have been made any time during those two years or before his  
 16 termination. Plaintiff fails to allege that these statements were made within the one year statute of  
 17 limitations. If these representations fall outside of the one year statute of limitations, then his claim  
 18 is time-barred.

19 The alleged statements made by TERRA-VAC to Plaintiff's prospective employers are  
 20 protected by the conditional privilege. Additionally, Plaintiff has failed to allege that these statements  
 21 were made within the one year statute of limitations. For these reasons, Plaintiff has failed to state  
 22 facts sufficient to support a claim for misrepresentation to a potential employer.

#### 23 IV.

#### 24 PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO STATE

#### 25 A CAUSE OF ACTION FOR LIBEL AND SLANDER PER SE

26 In his third cause of action, Plaintiff alleges that TERRA-VAC has made written and oral  
 27 representations regarding his honesty, the quality of his work, and the reasons for his discharge. (*See*  
 28 *Plaintiff's Complaint, page 6, lines 11-13*). Plaintiff's third cause of action is basically a reiteration

1 of his second cause of action except that he further alleges that, in addition to Plaintiff's potential  
2 employers, the statements were made to the U.S. Navy and investigators. (*See Plaintiff's Complaint,*  
3 *page 6, lines 17-19*).

4 Just as with the second cause of action, the statements alleged in Plaintiff's third cause of  
5 action made to potential employers of Plaintiff fall within the conditional privilege afforded by Civil  
6 Code section 47(c). Plaintiff alleges no malice, ill-will or further factual allegations regarding  
7 TERRA-VAC's state of mind at the time that these statements were made that would overcome the  
8 conditional privilege. The conclusory factual allegations that the statements were "uttered maliciously  
9 and with knowledge of their falsity" is not enough to overcome the privilege.

10 Further, as stated above California Code of Civil Procedure Section 340(c) provides a one  
11 year statute of limitations for actions for libel and slander. Plaintiff fails to allege that any of these  
12 statements were made within the one year statute of limitations that applies to actions for libel and  
13 slander. Plaintiff was discharged from his position at TERRA-VAC on October 26, 2005, more than  
14 two years before he filed a complaint. The misrepresentations that Plaintiff alleges were made to  
15 prospective employers and others could have been made any time during those two years or before  
16 his termination.

17 The alleged statements made by TERRA-VAC to Plaintiff's prospective employers are  
18 protected by the conditional privilege. Additionally, Plaintiff has failed to allege that any of these  
19 statements were made within the one year statute of limitations. For these reasons, Plaintiff has failed  
20 to state facts sufficient to support a claim for libel and slander per se.

21 V.

22 **ALL OF PLAINTIFF'S CAUSES OF ACTION FAIL BECAUSE THIS**  
23 **IS AN ARTFULLY-PLED CASE OF WRONGFUL TERMINATION**

24 Plaintiff is attempting to plead around the obvious defects of his claim for wrongful  
25 termination in violation of public policy. Plaintiff has alleged the aforementioned causes of action  
26 against his former employer because his claim for wrongful termination is fatally defective. Plaintiff's  
27 claim for wrongful termination is fatally defective because (1) it has been brought beyond the two  
28 year statute of limitations and (2) Plaintiff has failed to exhaust his administrative remedies.



1 A two year statute of limitations applies to actions for wrongful discharge in violation of  
 2 public policy. (California Code of Civil Procedure 335.1). The statute of limitations is triggered when  
 3 the employee receives notice of his termination. Smith v. United Parcel Service (1995) 65 F.3d 266,  
 4 268). On October 26, 2005, Plaintiff was informed that he was being terminated. (*See Plaintiff's*  
 5 *Complaint, page 4, lines 16-17*). Plaintiff's complaint was not filed until October 29, 2007. Therefore,  
 6 Plaintiff's complaint was filed beyond the two year statute of limitations.

7 "In California, it is well-settled that where an administrative remedy is provided by statute,  
 8 relief must be sought from the administrative body and this remedy exhausted before the courts will  
 9 act." (Gutierrez v. RWD Technologies, Inc. (2003) 279 F.Supp.2d 1223, 1225, citing Abelleira v.  
 10 Dist. Ct. of Appeal (1941) 17 Cal.2d 280, 292). The purpose of the administrative exhaustion  
 11 requirement is to allow the administrative agency the opportunity to investigate and resolve the  
 12 complaint. Where appropriate, the agency can provide a more economical resolution, including  
 13 ordering and monitoring corrective measures and agency hearings in place of judicial resolution.  
 14 (Rojo v. Kliger (1990) 52 Cal.3d 65, 83).

15 Several statutes provide administrative remedies for wrongful termination. The Fair  
 16 Employment and Housing Act ("FEHA") allows an administrative remedy for, among other things,  
 17 wrongful termination and employment discrimination based on physical disability or medical  
 18 condition. (California Government Code §12900, et seq.) An employee must exhaust an  
 19 administrative remedy provided by FEHA by filing an administrative complaint with the Department  
 20 of Fair Employment and Housing ("DFEH") and the failure to do so is a jurisdictional defect. (Martin  
 21 v. Lockheed Missiles & Space Company (1994) 29 Cal.App.4th 1718, 1724).

22 The appropriate agency to file charges for employment discrimination in violation of Title  
 23 VII of the Civil Rights Act is the Equal Employment Opportunity Commission. (42 U.S.C. e-5(f).)  
 24 Further, if a plaintiff plans on claiming discrimination under both federal and state law, then he must  
 25 obtain right-to-sue letters from both the DFEH and the EEOC. (Jones v. Grinnel Corp. (5<sup>th</sup> Cir. 2000)  
 26 235 F.3d 972,975).

27 Plaintiff has failed to exhaust his administrative remedies and is trying to plead around the  
 28 requirement. Plaintiff has failed to file claims with the appropriate agencies and has failed to obtain

1 and attach the necessary right-to-sue letters from the EEOC and/or the DFEH.

2 If Plaintiff brought a claim for wrongful discharge in violation of public policy, it would  
3 necessarily fail because he has not exhausted his administrative remedies and his complaint was filed  
4 beyond the two year statute of limitations. For this reason, Plaintiff has brought unsubstantiated  
5 causes of action against his former employer under the False Claims Act, for misrepresentation to  
6 potential employers, and for libel and slander. Plaintiff is attempting to plead around the obvious  
7 defects of a claim for wrongful termination.

8 **VI.**

9 **CONCLUSION**

10 For all of the foregoing reasons, according to the statutory and decisional authority cited  
11 herein, and in conformity with the principles of equity and fairness which guide this court, TERRA-  
12 VAC respectfully requests that this court grant this motion to dismiss Plaintiff's complaint.

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14 Dated: March 18, 2008.

**MAXIE RHEINHEIMER STEPHENS &  
VREVICH, LLP**

15  
16  
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